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In the

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL D. MIGRA,

Petitioner,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

GARY H. PALM
EDWIN F. MANDEL Legal Aid Clinic of the University of Chicago Law School and United Charities of Chicago
Legal Aid Bureau-United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Attorney for Amicus Curiae

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With the consent of the Petitioner and the Respondents, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Petitioner, Dr. Ethel D. Migra.

STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who bring civil rights claims against state and local government officials. Many of these claims involve both state and federal constitutional law issues. The application of traditional res judicata principles in Section 1983 actions would substantially restrict the availability of relief for those clients who first seek redress in the state courts.

SUMMARY OF ARGUMENT

Civil rights plaintiffs should be permitted to present state law claims to state courts and federal law claims under 42 U.S.C. §1983 to federal courts. Allowing plaintiffs this choice preserves the key federal purpose of §1983. That purpose is to insure that the federal courts will provide redress for violation of federal constitutional rights under color of state law. The Reconstruction era Congress that passed §1983 believed that neither state legislators nor state judges could be trusted to protect these rights. Mere filing of purely state law claims in state court should not override this purpose of §1983.

Since this Court's decision in England v. Board of Medical Examiners, 374 U.S. 411 (1963), plaintiffs have

been allowed to litigate their consitutional claims in federal court after litigating state claims in state court. Under England, and more recently under Allen v. McCurry, 449 U.S. 90 (1980), only relitigation of the same claim has been barred.

Dr. Migra seeks only to litigate constitutional claims she never raised in her successful state contract action. Allowing her to raise her federal claims now will not provide her with two opportunities to recover the same damages. Plaintiff is entitled to be compensated separately for violations of her constitutional rights.

Also, comity will be best served by allowing plaintiff to litigate her federal constitutional claim separately in federal court. This will leave state courts free to decide

questions of state law and statutory interpretation. Each court, thus, will be allowed to decide questions peculiar to the body of law over which it is most familiar.

However, to apply a res judicata bar to §1983 actions would have the opposite effect. Forced to choose between filing all their claims in either federal or state court, many §1983 plaintiffs would choose the federal forum. As a result, federal courts could become overwhelmed with state claims best decided in state court.

Dr. Migra also should be able to litigate her federal claim in federal court because state court dismissed her conspiracy count without prejudice. As a result, plaintiff had the right to refile that claim. Neither Ohio law nor this Court's

own construction of res judicata would bar plaintiff's current claim.

ARGUMENT

I. SECTION 1983 PROVIDES A CIVIL RIGHTS PLAINTIFF WITH THE RIGHT TO CHOOSE BETWEEN A FEDERAL AND A STATE FORUM TO PRESENT CONSTITUTIONAL CLAIMS.

A. The Purposes of §1983 Require That Dr. Migra Be Allowed To Bring Her Civil Rights Action In Federal Court.

A civil rights plaintiff should be allowed to bring federal civil rights claims before a federal court, so long as those claims have not first been litigated in a prior state proceeding. The purposes behind 42 U.S.C. §1983 require such a conclusion. At the same time, principles of comity and common sense argue against precluding civil rights litigants from taking their state claims into state court.

The primacy of the federal courts in adjudicating constitutional claims under §1983 cannot be disputed. Monroe v. Pape, 365 U.S. 167 (1961). Congress, by interposing the federal government as "guarantor of basic federal rights,"

> opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of this Nation.

Mitchum v. Foster, 407 U.S. 225, 229 (1972). The legislative history of §1983 similarly evinces clear congressional intent to "[alter] the relationship between the States and the Nation with respect to the protection of federally created rights." Id. at 242.

When a plaintiff chooses to pursue his state law claims in state court, he should be allowed to preserve

his right to present his federal constitutional claims in a federal court. The determination of state law claims should not act as res judicata to federal claims which were preserved for federal court and not presented or litigated in the state court. Any other result would violate the purposes of 42 U.S.C. §1983.

In Monroe v. Pape, Justice Douglas outlined three objectives of §1983. First, it provided a means of overriding certain state laws inimical to the Constitution. Second, a remedy would be provided when state law is inadequate. Third, §1983 would provide a federal remedy where the state remedy, though adequate in theory, is not available in practice. 365 U.S. at 173-74. Thus, the Court concluded that exhaustion of state

remedies was not required before bringing an action for damages under §1983 as "[t]he federal remedy is supplementary to the state remedy." Id. at 183. Last term in Patsy v. Board of Regents, ___U.S.___, 73 L.Ed 2d 172 (1982), this Court reaffirmed the determination in Monroe v. Pape, 365 U.S. 167 (1961) that civil rights plaintiffs need not exhaust state remedies before commencing §1983 actions.

Justice Harlan, concurring separately, in Monroe, additionally made clear the "supplementary" nature of the unique-ly federal relief provided by §1983:

> [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.

Monroe v. Pape, 365 U.S. at 196 (emphasis added); Carey v. Piphus, 435 U.S. 247(1979).

B. This Court Has Previously Allowed Civil Rights Plaintiffs To Litigate Federal Claims in Federal Court After Having Litigated Their State Claims in State Court.

Twenty years ago, this Court held in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1963), that plaintiffs who litigated state law claims in state court could retain a right to bring a separate federal action to litigate issues of constitutional law. Similarly, Dr. Migra sought relief under Ohio law in the Ohio courts. She now seeks to vindicate her federal constitutional rights before a federal tribunal.

In England, the plaintiffs had been ordered into state court under the Pullman abstention doctrine. After the state court had decided the case, this Court refused to attach

preclusive effect to the judgment of the state court on an issue of federal constitutional law. In so ruling, this Court emphasized the fundamental importance of a plaintiff's "right to litigate his federal claims fully in the federal courts."[1/] Id. at 417.

England draws a "bright and clear" line by which only those constitutional claims which have been fully litigated in state court are barred from subsequent relitigation before a federal court:

[1/] This principle was most recently recognized in the concurring opinion of Justice Brennan in Fair Assessment in Real Estate Ass'n v. McNary, ___ U.S. ___, 102 S.Ct. 177 (1981), in which Justices Marshall, Stevens and O'Connor joined. There it was indicated that those challenging the constitutionality of state tax laws could be required to first exhaust state administrative remedies before beginning a federal action under §1983. It is assumed that prior resort to the state forum for relief would not be a bar to a federal action but would indeed be required.

> [W]e see no reason why a party, after unreservedly litigating claims although not required to do so, should be allowed to ignore the state decision and start all over again in the District Court.

Id. at 419.

This position was also recognized in Allen v. McCurry, 449 U.S. 90 (1980). There, this Court held that issues actually decided by state courts should not be litigated again in §1983 cases raised in federal court. Id. at 95.

Allowing Dr. Migra to pursue her §1983 claim in federal court is fully consistent with this Court's holding in Allen. There, the Court was concerned with relitigation of an issue already raised and decided against the petitioner in state court. By contrast, none of Dr. Migra's potential federal claims were decided and she won the state issues she presented in state court. Thus,

permitting consideration of her federal claims would raise none of the policy concerns against relitigation highlighted in either England or Allen.

Also, allowing Dr. Migra to raise her federal claims would not provide her with an opportunity for "two bites at the apple." At no time during a subsequent federal court proceeding would she be allowed to relitigate any aspect of her state contractual dispute. Indeed, had Dr. Migra raised any of her federal claims at the state level, and had those issues been decided by that court, collateral estoppel would bar her from raising those issues anew in federal court under §1983. Allen v. McCurry, 449 U.S. 90, 95, 104.

C. Comity Will Not Be Hindered By Federal Court Consideration of Civil Rights Claims Following State Court Consideration of Related State Law Claims.

Comity, too, can best be served by district court consideration of Dr. Migra's §1983 claim. Her federal complaint raises only issues of federal constitutional law, an area of obvious federal court expertise. Permitting Dr. Migra to raise her federal claim in federal court will leave questions of state law and statutory interpretation to the state court, again, the most expert forum. This is the very essence of comity: each court would be allowed to decide questions peculiar to the body of law over which it is most familiar.

Furthermore, permitting Dr. Migra to separate her state claims from those raised under §1983 is not foreclosed because of any special

or urgent need for finality. See, e.g., Castorr v. Brundage, 51 U.S.L.W. 3285 (Oct. 12, 1982)(Stevens, J., concurring in the denial of certiorari). There, the Court was asked to resolve a dispute over parental rights. At issue was the effect of a prior state court adjudication on the subsequent filing of a §1983 claim in federal district court.

Justice Stevens, agreeing with the Sixth Circuit, wrote that, because of the special facts of the case, the importance of finality was "compelling." Dr. Migra's case involves none of the "compelling" facts at issue in Castorr. First, that case involved child custody, an area going to the heart of the police power of the state and one not customarily heard by federal courts. Second, prolonged litigation, he warned,

could have "an adverse effect on the emotional and physical health of the child." 51 U.S.L.W. at 3285. In Dr. Migra's case, her rights under her employment contract with the Warren City School Board have been finally and effectively dealt with. Nor has Dr. Migra asked the federal courts to upset this finding. Whatever special interests the State of Ohio had in adjudicating contract claims between employees and governmental agencies, these interests have been met.

As a general policy concern, the application of res judicata to §1983 will dramatically increase the caseload of the federal district court. Forced to choose between an exclusively federal or state forum, many §1983 litigants will file as a matter of course in the federal

court in order to preserve the availability of that forum.[2/] As a result, the federal courts will be overwhelmed by the unnecessary task of having to sort through related state claims best litigated in the state courts.

In addition, such a decision will greatly diminish the possibility of resolving potential federal constitutional claims without recourse to the federal courts. As a matter of jurisprudence, this Court has historically recognized that constitu-

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2/ In Kremer v. Chemical Construction Corp., ___ U.S. ___, 50 U.S.L.W. 4487 (Oct. 12, 1982), this Court held that res judicata must apply under 28 U.S.C. ¢1738 to Title VII actions brought in federal court. Even in the year since then, counsel for amicus, who specializes in employment discrimination cases in Illinois, has found that he and other attorneys are abandoning employment discrimination claims after adjudication by Illinois' human rights agencies. Then, they are commencing Title VII actions rather than allowing their claims to reach state court.

tional questions should not be passed upon if there is "any other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

In their opinions in Patsy v. Board of Regents, Justices O'Connor and Powell both recognized the important practical effect of mooting potential federal claims through the use of state administrative remedies. 73 L.Ed.2d at 188 (O'Connor, J., concurring); 198 (Powell, J., dissenting). Both Justices agreed that, by leaving the way clear for resolution of potential federal claims at the state level, state administrative procedures would help relieve an already overburdened federal case-

load

At its worst, application of res judicata to §1983 claims would leave the federal courts in the anomolous position of deciding state law claims. This outcome is clearly inimical to the principles of comity established by this Court.

A finding that res judicata applies in this instance would produce the ludicrous result that plaintiffs would file useless federal court actions only to have the court abstain under the Pullman doctrine and remit them to state courts to have state claims decided. Such an obviously inefficient procedure would land the plaintiff in the identical position as that now maintained by Dr. Migra, but only at a tremendous cost to the district court in terms of time and human resources.

A needless procedural run-around such as this was rejected in Board of Regents v. Tomanio, 446 U.S. 478 (1979)(Stevens, J., concurring). There, Justice Stevens persuasively argued that a plaintiff should not be required to file simulataneously in both federal and state court simply in order to avoid a time bar under a federal statute of limitations. Such an exercise, he wrote, "make[s] no sense to me in terms of either federalism or judicial administration." Id. at 493.

D. Because Dr. Migra Has Litigated Only Her State Law Claims She Should Not Be Barred From Now Litigating Her §1983 Claims in Federal Court.

Since Dr. Migra litigated only her contract claim in state court her federal civil rights claim should not now be barred. Plaintiff original-

ly sued the Warren City District School Board and three of its members in the Ohio Court of Common Pleas under a common law claim of conspiracy as well as under a breach-of-contract claim. At the beginning of the trial the judge, sua sponte, "reserved and continued" plaintiff's conspiracy count. Several weeks after the trial, the state judge dismissed that claim without prejudice.

In Ohio, a dismissal without prejudice has no res judicata effect. Chadwick v. Barbae Lou, Inc., 69 Ohio St.2d 222 (1982). Therefore, plaintiff was free under Ohio law to refile her conspiracy claim.

Instead, Dr. Migra filed a new action in federal district court under §§1983 and 1985. She alleged that defendants reacted with "fierce hostility" to her work as the head

of a teachers committee which was formulating a controversial social studies curriculum and her work as director of a commission planning desegregation of the Warren City schools. As a result of this hostility, defendants spread false and malicious rumors about plaintiff's private life and they breached plaintiff's contract of employment. All this was done, plaintiff contended, "pursuant to a pre-conceived plan to eliminate the plaintiff as the Supervisor of Elementary Education for the Warren City School District." (Plaintiff's U.S. District Court complaint, pp. 3-5).

Since plaintiff would not have been barred by res judicata from seeking redress in Ohio courts under her conspiracy claim, she should be free to pursue this claim in federal court.

Furthermore, under this Court's own definition of res judicata, plaintiff would not be barred. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Kremer v. Chemical Construction Corp., ___U.S.___, 50 U.S.L.W. 4487, 4489 n.6. (May 18, 1982). Since the state judge refused to hear plaintiff's conspiracy claim, this matter neither was litigated nor could it have been litigated.

Allowing Dr. Migra to pursue her claim is also consistent with this Court's reasoning in Kremer. There, the Court held that a person who fully litigated, and lost, an employment discrimination action in the agencies and courts of New

York could not litigate his claim under Title VII in federal court. Writing for the Court, Justice White noted that the elements of Kremer's cause of action under Title VII were "virtually identical" to the elements of his cause of action under New York's employment discrimination law. Thus, he concluded, the state court's decision against Kremer "also decided that a Title VII claim arising from the same events would be equally meritless." Id. at 4492.

In this case, unlike Kremer, the elements of plaintiff's state claim are not the same as the elements of her federal cause of action. To win her contract dispute in state court, Dr. Migra only had to show that the school board made a valid offer which she accepted before its recission. But technical issues

of offer and acceptance as applied to municipalities in Ohio have little in common with the elements of plaintiffs' claims under §1983 and §1985.

Also, unlike Kremer, Dr. Migra won her prior state court action. The finding that the school board breached her contract buttresses, rather than defeats, plaintiff's case. Therefore, unlike the situation in Kremer, a federal court finding in favor of plaintiff would in no way clash with the state court decision.

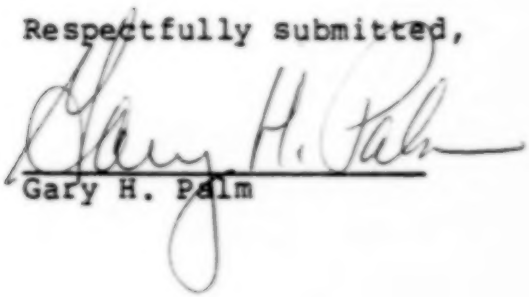
However, Dr. Migra has not been compensated for the violation of her constitutional rights and the defamation she suffered as a result of defendants' conduct. Even if she could show no other actual injuries, she would be entitled to damages for violation of her constitutional

rights. Carey v. Piphus, 435 U.S. 247 (1978).

CONCLUSION

For the aforementioned reasons the judgment below should be reversed.

Respectfully submitted,



Gary H. Palm

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic of the
University of Chicago Law School and
Legal Aid Bureau-United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

Counsel for Amicus Curiae